



NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

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July 2, 1987

Office of General Counsel

Ms. Barbara Chastain
Vice President Personnel
S.A.F.E. Federal Credit Union
P.O. Box 1057
North Highlands, California 95660-1057

Dear Ms. Chastain:

This is in response to your letter of April 27, 1987, regarding the permissibility of Federal credit unions (FCU's) providing deferred compensation benefits to their employees.

Section 701.19(a) of the NCUA Rules and Regulations provides, in part, that an FCU may make provision for reasonable retirement benefits for its employees. By virtue of this provision, an FCU has the authority to establish a deferred compensation plan for its employees. Section 701.19 further states that if the FCU is the custodian or trustee of an employee benefit plan, the plan must be an individual retirement plan maintained in accordance with the provisions of Section 724.1 of the NCUA Rules and Regulations. Section 724.1 provides that an FCU may be a trustee or custodian of a pension plan qualifying under Section 401(d) or Section 408 of the Internal Revenue Code. These sections provide for IRA and Keogh plans. If the FCU is not the plan trustee or custodian, an individual retirement account need not be established in share or share certificate accounts at the FCU.

We have previously stated that an FCU does not have the authority to invest the funds used to establish the deferred compensation plan on behalf of the employees that are covered by the plan. This position was based upon the fact that FCU's do not have general trust powers, and to the extent that the FCU invests funds on behalf of employees, it would be operating as a trustee.

While an FCU may not invest the deferred compensation funds on behalf of an employee, we have recently opined that FCU's can purchase annuities pursuant to the terms of a deferred compensation agreement where the FCU was both the owner and beneficiary of the annuity. As you know, Section 107(7) of the FCU Act provides the investment authority for FCU's. This section would not permit FCU's to invest in annuities for their own account. In determining that the FCU could purchase an

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annuity under the above described circumstances, we recognized that the FCU was not purchasing the annuity as an investment for its own account. Instead, the FCU was acting pursuant to its authority to provide retirement benefits, and was therefore not limited by Section 107(7).

The determination that FCU's could purchase annuities under the circumstances described herein reverses a prior opinion of this office on a similar issue. In the prior opinion, we concluded that this type of purchase was impermissible on either one of two legal theories. First, we stated that the purchase constituted an impermissible investment under Section 107(7). Alternatively, we concluded that, in reality, the FCU was acting as a trustee, i.e., the FCU was holding the investment as trustee on behalf of the employee/beneficiary. As stated above, an FCU does not have the authority to serve as a trustee under these circumstances. The prior opinion did not consider whether the investment was permissible pursuant to the FCU's authority to provide retirement benefits which is the basis of our recent opinion on this issue.

Lastly, we suggest that, in establishing a deferred compensation plan, you or the FCU attorney review the pertinent Internal Revenue Code sections and regulations.

We trust this has been of assistance.

Sincerely,



STEVEN R. BISKER
Assistant General Counsel

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